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**IN THE FIFTH DISTRICT COURT**
**WASHINGTON COUNTY, STATE OF UTAH**

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| STATE OF UTAH,<br><br>Plaintiff,<br><br>vs.<br><br>WARREN STEED JEFFS,<br><br>Defendant. | **MEMORANDUM IN SUPPORT OF CLOSURE OF DEFENDANT'S MOTIONS IN LIMINE AND SUPPRESSION HEARINGS**<br><br>**[FILED UNDER SEAL]**<br><br>**Case No. 061500526**<br><br>**Judge James L. Shumate** |

## INTRODUCTION

The Defendant has filed multiple motions in limine under seal seeking to exclude from evidence the anticipated testimony of various prosecution witnesses, as well as certain statements made by the Defendant while in jail. The Media Intervenors have

already had a strong influence on the publicity of the present case, and the Defendant believes that public dissemination of potentially inadmissible evidence, as obtained from his motions to suppress or from the hearings on those motions, prior to a ruling on admissibility, would jeopardize his constitutional rights to a fair trial by an impartial jury. The Defendant therefore asks this Court to allow the motions in limine to remain under seal, or to allow public access only to redacted copies, and to close public access to any suppression hearings. The Defendant will address the potential harm from pretrial publicity of the aforementioned evidence at the closure hearing scheduled for July 17, 2007.

## ARGUMENT

### I. All Motions To Suppress Evidence, And Memoranda In Support Thereof, Should Remain Under Seal, Or Should Be Redacted Prior To Public Access.

The Supreme Court of Utah has held that there is a presumptive right of public access to preliminary bind-over hearings, *Kearns-Tribune Corp., Publisher of Salt Lake Tribune v. Lewis*, 685 P.2d 515 (Utah 1984), to competency hearings, *Society of Professional Journalists v. Bullock*, 743 P.2d 1166 (Utah 1987), and to documents filed in connection with preliminary bind-over hearings, *State v. Archuleta*, 857 P.2d 234 (Utah 1993). Regarding motions to suppress evidence, the Supreme Court of Utah has suggested that there are "added risks of prejudice through pretrial disclosure of evidence targeted in a motion to suppress," *Kearns-Tribune*, 685 P.2d at 521, but Utah's appellate courts have not expressly addressed whether the public has a right to access those motions, see *Archuleta*, 857 P.2d at 239 n.20 ("We stress, however, that the Press seeks, and our ruling specifically is limited to, documents filed in relation to a

criminal preliminary hearing."). To the Defendant's knowledge, there is no controlling case law that has directly addressed the issue of whether the public or the press has a constitutional right to access motions to suppress evidence.

The Tenth Circuit Court of Appeals, in *United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997), noted that "[a] number of circuits have concluded... that the First Amendment balancing test... should be applied before... documents and records can be sealed," *Id.*, 119 F.3d at 811, but emphasized that such courts did not always "conclude that these records had to be made available to the public after the balancing test was applied," *Id.*, 119 F.3d at 811 (citations omitted). The *McVeigh* Court ultimately passed on the issue of "whether there is a First Amendment right to judicial documents," *Id.*, 119 F.3d at 812, although it did find that "court documents are covered by a common law right of access," *Id.*, 119 F.3d at 811 (citing *Nixon v. Warner Communications*, 435 U.S. 589, 599 (1978)). In spite of the ambiguity surrounding the constitutional rights of the public to access pretrial suppression motions, the press has at least some interest in obtaining access. Regardless of whether that interest is constitutionally-based, or merely grounded in common law tradition, the Defendant maintains that any right to access pretrial motions is not absolute. As the *McVeigh* Court concluded, the public has a right to access pretrial motions to suppress, but such documents may nevertheless remain under seal "if the right to access is outweighed by the interests favoring nondisclosure," *Id.* (citing *Nixon*, 435 U.S. at 602).

In the present case, the Defendant's undisputed constitutional right to a fair trial by an impartial jury requires nondisclosure. USCS Const. Amend. 6; Utah Const. Art. I, § 12. The evidence sought to be suppressed by the Defendant's motions in limine are

all statements, either in the form of declarations made by the Defendant while in jail, or in the form of statements made to investigators by various expected State witnesses. The various statements are being challenged in substantial part on grounds of relevance and unfair prejudice, and are often quoted in part or included in their entirety throughout the Defendant's motions. Thus, allowing unrestricted public access to the Defendant's motions would be tantamount to allowing public access to the evidence itself. Yet, as the *McVeigh* Court noted, "the right of access to suppression hearings and accompanying motions does not extend to the evidence actually ruled inadmissible in such a hearing." *Id.*, 119 F.3d at 813 (citing *United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977); *In re Globe Newspaper Co.*, 729 F.2d 47, 54 (1st Cir. 1984); *Pell v. Procunier*, 417 U.S. 817, 834 (1974)). It was for this reason that the *McVeigh* Court, finding that motions to suppress often make reference to inadmissible evidence, upheld a trial court's decision to redact copies of motions available to the public. *Id.*, 119 F.3d at 814-15. Since the Defendant's motions and memoranda contain potentially inadmissible evidence, the Court would be justified in keeping the documents under seal, or at least redacting all potentially inadmissible statements prior to allowing public access.

In terms of public policy, the interests that typically justify press access to court proceedings and documents are "to promote an informed discussion of government affairs," *Kearns-Tribune*, 685 P.2d at 518, and "to ensure the fairness of the criminal trial," *Id.*, 685 P.2d at 518. However, because the evidence within the Defendant's motions and memoranda could potentially be ruled inadmissible, these policy justifications simply do not apply in the instant case. First, regarding the promotion of

an informed public discussion, the Defendant maintains that "[a]ccess to inadmissible evidence is not necessary to understand the suppression hearing, so long as the public is able to understand the circumstances that gave rise to the decision to suppress." *McVeigh*, 119 F.3d at 813. The Defendant's motions to suppress include potentially inadmissible statements, and access to that evidence, prior to a ruling on its admissibility, is not necessary to understand the process of the criminal trial. The rationale that public access will promote an informed public discussion is simply inapplicable to the Defendant's motions.

Regarding the assurance of a fair trial, the Defendant's motions to suppress are specifically designed to keep potentially harmful and prejudicial evidence from the jury.

> "[D]isclosure of such evidence would play a negative role in the functioning of the criminal process, by exposing the public generally, as well as potential jurors, to incriminating evidence that the law has determined may not be used to support a conviction."

*McVeigh*, 119 F.3d at 813. The Defendant's unequivocal right to a fair trial by an impartial jury would actually be impeded, rather than promoted, by allowing public access to his motions to suppress. "[A]t the very least, dissemination of such information into the community biases the jury panel in that it becomes necessary to exclude citizens who carefully read news reports or who are interested in following current events." *Kearns-Tribune*, 685 P.2d at 527 (Daniels, J., concurring and dissenting). By keeping the Defendant's motions under seal, references to potentially inadmissible evidence will not be disseminated to the public, and will not interfere with the Defendant's right to a fair trial.

Ultimately, the Defendant's motions to suppress evidence, and memoranda in support thereof, should remain under seal, or at least be redacted prior to allowing public access. Otherwise, any future ruling to exclude irrelevant or prejudicial evidence from use at trial would be rendered meaningless by public dissemination of that same evidence to the jury pool. Allowing public access to the Defendant's motions to suppress evidence, prior to a ruling on admissibility, would neither aid in an informed public discussion nor ensure his right to a fair trial. And any remaining interests or rights the public may have to access the pretrial motions in question are outweighed by the potential risk of irreparable harm to the Defendant's constitutionally guaranteed rights to a fair trial and an impartial jury.

## II. Suppression Hearings To Determine The Admissibility Of Evidence Should Be Closed From Public Access.

The Supreme Court of Utah has held that a trial court may close a pretrial hearing where it makes specific findings that the hearing would generate adverse publicity that could prejudice the defendant's right to a fair trial by an impartial jury, and where the court takes into consideration alternative means of jury selection and trial logistics that might assure an impartial jury. *Kearns-Tribune*, 685 P.2d at 523 (citing *State v. Williams*, 93 N.J. 39, 69, 459 A.2d 641, 656-57 (N.J. 1983)). Further, the party seeking closure of a pretrial hearing has the burden of showing a "'realistic likelihood of prejudice' as a result of adverse publicity traceable to the open hearing." *Id.*, 685 P.2d at 523 (citing *Williams*, 93 N.J. at 69, 459 A.2d at 656). In the present case, the Defendant contends that public access to suppression hearings would create a realistic

likelihood of prejudice to the potential jury pool, and seeks to close the suppression hearings accordingly.

In one of his motions to suppress, the Defendant is seeking to exclude from evidence statements that he made while in jail. The statements were vague, ambiguous, and temporarily remote, but implied that the Defendant had done something improper and immoral with a woman and her daughter when he was in his twenties. The relevance of the Defendant's actions from many years ago seems dubious, and the suggestive nature of the comments, especially in the context of the current trial, creates the potential to prejudice the jury pool. For example, the Defendant's statements might improperly lead the jury to believe that the Defendant's conduct had been sexual, when in reality the details of the Defendant's past acts are entirely unknown. The Defendant's statements are thus being challenged for their relevance, their reliability, and their potential to unfairly prejudice the jury.

Similarly, the Defendant is seeking to exclude the anticipated testimony of various expected State witnesses. The State has provided numerous interviews and summations of interviews conducted with potential witnesses. The contents of the statements generally convey the interviewee's personal *dislike* of the Defendant, and include numerous anecdotes about the Defendant that have little or nothing to do with the alleged acts that gave rise to the present trial. The potential testimony is fraught with hearsay concerns, allegations that amount to nothing more than improper character evidence, and recitations of irrelevant acts or statements of the Defendant, all of which could potentially mislead and prejudice the jury against the Defendant.

If any of the foregoing statements were found inadmissible for any reason, public dissemination of the Defendant's declarations would render such a ruling effectively moot. However, the fact-specific nature of the Defendant's assertions regarding the State's evidence will make it difficult to present a coherent and meritorious argument for suppression without specific reference to the statements and expected testimony. For this reason, the Defendant asks this Court for closure of the hearings.

It is worth noting that the Defendant is not seeking closure of a preliminary bind-over hearing, as in the *Kearns-Tribune* case, or even closure of a competency hearing, as in *Bullock*. The risk of jeopardizing the Defendant's right to a fair trial is perhaps at its greatest when considering closure of an evidentiary suppression hearing. As the United States Supreme Court recognized in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), "[p]ublicity concerning pretrial suppression hearings... poses special risks of unfairness." *Id.*, 443 U.S. at 378. The *Gannett* Court further elaborated:

> The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury. Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial.

*Id.*, 443 U.S. at 378 (citation omitted). The Defendant's right to a fair trial by an impartial jury is constitutionally guaranteed. USCS Const. Amend. 6; Utah Const. Art. I, § 12. Allowing potentially inadmissible evidence to be disseminated by allowing public access to suppression hearings would jeopardize that right.

Of course, the exact effects of publicity surrounding a pretrial suppression hearing are difficult to measure. *Gannett*, 443 U.S. at 378. But it is clear that public

interest and media coverage in the Defendant's trial has been exceptionally high. The United States Supreme Court has stated that:

> "[c]losure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of [prejudicial] information throughout the community before the trial itself has even begun."

*Id.*, 443 U.S. at 379 (citation omitted). In order to prevent public dissemination of potentially inadmissible evidence, and to safeguard the Defendant's constitutional rights, public access to the pretrial suppression hearings should be closed.

Given that difficulties of arguing for suppression without specific references to the evidence, and given the unique risks inherent to the publicity of pretrial suppression hearings, the Defendant seeks to close all hearings on his motions to suppress. In accordance with *Kearns-Tribune* and its progeny, the Defendant will argue the merits of the request for closure at the closure hearing.

## CONCLUSION

The Defendant's motions in limine should remain under seal, or should be redacted prior to allowing public access. Likewise, the suppression hearings on the Defendant's motions should be closed from public access.

DATED this 9th day of July, 2007.

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## CERTIFICATE OF SERVICE

I hereby certify that, on the 9 day of July, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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